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RIGHTS FOR CANADIAN MEMBERS OF INTERNATIONAL UNIONS UNDER THE (U.S.) LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Alan Hyde*

The president-elect of Local 419 of the International Brotherhood of Teamsters pleads guilty to a criminal charge of stealing \$200,000 worth of goods from a Teamster-represented warehouse. Nevertheless, the president takes office and serves his term, along the way seeing that the candidate he defeated is blacklisted from employment in the industry and thus loses his Teamster membership and right to run again for office.¹

The independent-minded president of Local 1005, United Steelworkers of America, is tried before a local trial committee, composed of his political opponents, on the charge of refusing to read at an earlier meeting a previous set of charges against him. Convicted of this momentous charge, he is suspended at a poorly-attended membership meeting not only from office but from membership as well. Subsequent, better-attended meetings attempt to undo the suspension, but the International maintains they are unable to do so.²

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This study was prepared at the request of the Association for Union Democracy, Inc. The conclusions are those of the author. The author acknowledges with gratitude the comments of Herman Benson, Arthur L. Fox II, Terry Fraser, H.J. Glasbeek, Michael Goldberg, James K.A. Hayes, Brian A. Langille, Clyde Summers, and Paul Weiler, and the extraordinary research assistance of Anita Raby at the University of Michigan and Robert Carroll at Rutgers. The usual exculpation applies fully but is probably unnecessary; anyone who knows any of my reviewers can imagine how much he disagreed with which parts of the study.

Ted Stein assisted the author in the early stages of this project, suggesting many helpful analogies and lines of inquiry. He did not live to see the final product, which would have been very much better had Ted been able to read it. Nevertheless, in gratitude for Ted's help, and for all he meant to me, this article is humbly dedicated to his memory. It is only one of scores of articles, to be published by many authors over the next decades, which will be less good than they might have been had Ted been able to offer his insight and support.

When someone you love goes your life isn't ruined, it can be only very rarely that you are broken-hearted, but life *afterwards* is different. You can never quite replace those friends. There are others but they are not *those*. How marvellous the absolute distinctness of every human being—this *surely the most incredible* thing in life.

Hugh Walpole, in his journal (June 1925), as quoted in R. HART-DAVIS, HUGH WALPOLE: A BIOGRAPHY 261 (1952).

1. *Trouble at the Top in Teamsters Local*, Toronto Star, Dec. 18, 1985, at 14, col. 1.

2. *Dispute in Ontario Steel Local 1005*, Union Democracy Review No. 39, Mar. 1984, at 7. For some background, see Millar, Book Review, 14 LABOUR/LE TRAVAIL 236 (1984) (reviewing B. FREEMAN, 1005: POLITICAL LIFE IN A UNION LOCAL (1982)). The president was reinstated to his membership and office, Taylor v. Atkinson, 6 Can. Cas. Empl. L. 112 (Ont. H.C. 1984), but was subsequently defeated for reelection.

At a convention of leaders of building trades unions, the national leadership presents a booklet prepared by themselves and employer leaders, laying out a menu of contract concessions. A business manager in the Sheet Metal Workers attacks the booklet as "garbage" and a danger to the unions' position in future bargaining. The convention votes by a large majority to disapprove the booklet. Nonetheless international leaders in the Sheet Metal Workers charge the business manager with disloyalty and slander. Under the union constitution this exposes him to possible loss of his position or even expulsion from the union and exclusion from all union work.³

In none of these cases did the affected employees hie off to the United States District Court and sue the Teamsters, Steelworkers, or Sheet Metal Workers to redress these apparent violations of the Bill of Rights of Members of Labor Organizations.⁴ Why not? The short answer is simple. The affected unionists in each case were Canadian members of so-called "international" unions, unions with headquarters in the United States and members in both the United States and Canada. This article addresses the question of whether the short answer makes sense; whether, in other words, Canadian members of international unions based in the United States acquire any rights under the Labor-Management Reporting and Disclosure Act (LMRDA) which they can enforce in the courts of the United States.⁵ It

3. *Probe Needed to Save Democracy in Labor, Unionists Say*, Toronto Star, Jan. 22, 1986, at A8, col. 1.

4. Title I of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 (LMRDA), 29 U.S.C. §§ 411-415 (1982).

5. This article is limited to the question of rights which a court of the United States might enforce. It does not examine any rights which a Canadian unionist, victimized by an unfair disciplinary proceeding, might have under Canadian law. Canadian law governing the union-member relation is rich and complex, and I am far from comfortable with any but the briefest discussion here. For a hornbook introduction, see G. ADAMS, CANADIAN LABOUR LAW: A COMPREHENSIVE TEXT 770-861 (1985).

As a general matter, it appears that a Canadian unionist may have a cause of action to enforce rights under the union's own constitution or by-laws, a suit conceptualized in Canada as in the United States as a suit for breach of contract. *Orchard v. Tunny*, 8 D.L.R.2d 273 (Ont. H.C. 1957). Second, the unionist may have a common law action to secure "natural justice" from an institution, here the union, performing "quasi-judicial" functions. On both these common law actions, see generally *Bimson v. Johnston*, 10 D.L.R.2d 11 (Ont. H.C. 1957), *appeal dismissed*, 12 D.L.R.2d 379 (Ont. C.A. 1958); *Tippett v. International Typographical Union*, 63 D.L.R.3d 522 (B.C.S.C. 1976). See also *Taylor v. Atkinson*, 6 Can. Cas. Empl. L. 112 (Ont. H.C. 1984) (common law suit to enforce the union constitution).

Statutory labor law in Canada is largely provincial. Federal jurisdiction is limited to certain federally regulated industries such as banks and airlines. The provinces vary considerably in their regulation of internal union affairs and generalization is useless. There generally are reporting and disclosure requirements at least as stringent as those in the LMRDA. Some provincial statutes govern union discipline explicitly; some do so as interpreted by the relevant labor board; some do not regulate internal union affairs at all.

The existence of this substantial body of law raises the question of why a Canadian unionist would have any interest in the LMRDA. In the cases with which I am familiar, there has been no "end run"

concludes that Canadian members of United States-based international unions may sue their internationals in United States courts for violation of the LMRDA.

While the treatment here is academic, the underlying question is anything but. This is a time of unusual ferment in the Canadian labor movement, in large measure concerning the issue of Canadian nationalism and local control. While a history of the dispute is not possible here,⁶ it affects the subject of this article in at least two ways. First, at the moment in Canada it is common for locals or other bodies to be split into factions, one favoring ties with the United States-based international, the other favoring local autonomy if not independence. Construction international unions have withdrawn from the Canadian Labour Congress (CLC), created a pro-American rival Canadian Federation of Labour (CFL), and have disciplined

around Canadian labor law, no journey to America to obtain a ruling directly contradicting applicable Canadian law. Rather, the issue has been one in which the applicable Canadian authority has been sparse and undeveloped while in the United States a clear doctrine or indeed a specific judicial decree, *see infra* note 15, governed the point.

I cannot stress too strongly that this entire article proceeds from the assumption, correct as of 1986, that the Canadian and American law of union democracy aims at substantially similar goals with the differences being those of emphasis. Only under these circumstances does it make sense to have an international union, reviewing discipline imposed by a Canadian local, bound to apply both Canadian and United States law. In such a regime of overlapping purpose, any regulatory conflicts may be dealt with as they arise. Diligent search has failed to unearth any current situations in which the application of the LMRDA to the Canadian activities of an international union would create any conflict with applicable Canadian law.

This article similarly does not address the very interesting questions whether any provision of the LMRDA might ever be enforced by a Canadian court. Fuller development of the point would have to be by a scholar with a better "feel" than I have for the likely responses of Canadian courts. There do not appear to be any reported cases of such a Canadian application of the LMRDA. Nonetheless, at least three possible occasions for the application of the LMRDA by a Canadian court appear. First, in a common law action to enforce the union constitution, the Canadian court might conclude that a clause of the international constitution, say a prohibition on "slandering a union officer," violated the LMRDA and was null and void under section 101(b), 29 U.S.C. § 411(b) (1982). *See Note, Facial Adjudication of Disciplinary Provisions in Union Constitutions*, 91 YALE L.J. 144 (1981). (Clyde Summers and Harry Glasbeek both made this point to me.) Second, the Canadian court, hearing the actions alleging breach of contract and want of natural justice, might determine that the proper law of the "contract" with an international union includes the LMRDA. This is a question of the domestic choice of law rules applied by the Canadian provincial court. As a general matter, Canadian courts determining the proper law of the contract apply "the system of law with which the transaction has its most substantial and real connections." J. MCLEOD, *THE CONFLICT OF LAWS* 469-88 (1983). Third, the Canadian court, which is in no sense bound by the LMRDA, might regard it as a helpful analogy. This has been the practice of United States courts forced to develop the common law of the relationship between the public employee and the union composed strictly of public employees. *See, e.g., James v. Camden County Council No. 10 of the N.J. Civil Serv. Ass'n*, 188 N.J. Super. 251, 457 A.2d 63 (1982). (Michael Goldberg drew my attention to this case.)

6. *See generally* Adams, *Canada-U.S. Labor Link Under Stress*, 15 INDUS. REL. 295 (1976); Rose, *Some Notes on the Building Trades-Canadian Labour Congress Dispute*, 22 INDUS. REL. 87 (1983); Thompson & Blum, *International Unionism in Canada: The Move to Local Control*, 22 INDUS. REL. 71 (1983).

locals which argue against the policy of continued United States ties. The intensity of feeling seems to have led in some cases to an increase in antidemocratic activity, including a greater use of trials and disciplinary proceedings against political opponents.⁷ Secondly, the political debate in Canada is in part a descriptive disagreement about the nature of the current institution of "international unionism." Is Canadian autonomy possible within this structure, or only by exit from it? It is hoped that inquiry into the legal nature of the relationship between the Canadian worker and the American union may clarify a very small portion of the larger question.⁸

Apart from its practical significance to participants in current Canadian union struggles, this article also aspires to a conclusion of interest to scholars of international law. At first blush, the problem of this article appears to be full of international law implications. The dread spectre of "extraterritoriality," or "E.T." to international law aficionados—and a word we will not encounter much in this article—seems to loom over the problem. Faint echoes of monumental battles seem to reverberate over this one.

I hope to show in this article that the most convincing analysis of the problem involves no concepts or doctrines of international law whatever. There are problems of choice of law, of personal jurisdiction, and of the substantive law of the LMRDA. Once these are solved, however, the underlying problem is solved too, and there is simply no scope for international law thinking here, as traditionally defined. To be sure, some interna-

7. The statement in the text is not based on systematic analysis of Canadian union behavior, but is merely an impressionistic account of the kinds of inquiries and complaints which the Association for Union Democracy, Inc. has been getting from Canada.

This study was undertaken at the request of the Board of Directors of the Association for Union Democracy, Inc. in order to obtain a better understanding of the possible application of the LMRDA so as to better advise the Canadian unionists who have been in contact with the Association. I understood my responsibility to be the accurate prediction of legal results, and have not attempted to advocate any position lacking substantial support. The Association has in no way attempted to influence any conclusions which I have drawn.

8. Obviously neither the author nor the Association for Union Democracy takes any position on the underlying political debate whether Canadian workers should be represented by national or international unions.

Several readers have found it hard to fathom why Canadian nationalists, feeling the brunt of union discipline on account of their nationalism, would be able, consistent with their principles, to invoke United States law. I can only report that such inquiries have been received. I am not a Canadian and under the circumstances it would be particularly insensitive for me to comment on the politics of Canadian nationalism as against the United States, an issue which obviously influences Canadian reaction to a range of topics, even an ostensibly technical legal analysis such as this.

If I am correct in my analysis of American law, however, the most likely resolution of the legal question is the application of the LMRDA to United States-based international unions but not to Canadian local unions. It is not for me to say whether this outcome would be an acceptable political result for any unionist, Canadian or American, to bring about.

tional law scholars have themselves suggested this approach,⁹ and we will encounter cases which might perfectly well have been seen as problems in “extraterritoriality” or “international law” which were instead analyzed as pure problems of the choice of law.¹⁰ There may be additional interest in seeing another area worked out in which it is possible to overcome international law thinking entirely, at the risk of making this article an unwanted interloper at this international law feast.

Part I of this article briefly states the problem in fact and law. Part II surveys some of the approaches which United States courts have employed to determine the applicability of federal statutes to foreign plaintiffs or to the foreign activities of American entities. My aim will be to canvass some of the possible vocabulary and theoretical approaches which an American court might invoke to decide whether to apply the LMRDA to the Canadian activities of a United States international union. This will be done with some faintness of purpose since, as will emerge, there has been little borrowing from one body of statutory learning to another, let alone the construction of anything regarding a general theoretical approach. Indeed, the very terminology varies, and the broad question of this article will, it turns out, be able to be phrased as either one of jurisdiction, the substantive reach of a statute, or choice of law.¹¹ My attention will come to rest on three theories of the jurisdiction of a state to prescribe rules of conduct. Under the “nationality” theory, Congress may prescribe rules of conduct governing the foreign conduct of American nationals. Under the “objective territorial” principle, Congress may regulate purely foreign conduct which has certain effects within the United States. Under the “choice of law” approach, these questions of jurisdiction are simply omitted. Instead, the court decides whether it has personal jurisdiction of the defendant and then

9. I have been particularly influenced by Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VA. J. INTL L. 395 (1983); Lowenfeld, *Extraterritoriality: Conflict and Overlap in National and International Regulation*, 74 AM. SOC. INT'L L. PROC. 30 (1980); Note, *Extraterritorial Application of United States Law: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976).

10. Notably, *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), discussed *infra* Part II.C & note 59.

11. Cf. Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANSNAT'L L. 439 (1981) (pointing to inconsistent results under different trade statutes, criticizing the failure of courts to adopt wholeheartedly either the nationality principle or effects test discussed in this article, and calling for a “consistent theory” without actually suggesting any).

It is not, by the way, obvious that a consistent theory would be valuable or feasible. I shall be arguing that the choices are essentially legislative ones in which the court attempts an empathetic identification with a hypothetical legislature. This is a valid descriptive and normative theory of some instances of adjudication, which does not, however, lend itself well to rules.

decides as a matter of substantive law what law governs the relationship between plaintiff and defendant and whether plaintiff's cause of action is part of that law. All of these theories are recognized and applied by the courts of the United States. Any or all would provide a basis for applying the LMRDA to union discipline against Canadian unionists. All turn principally on an examination of the intent of Congress in enacting the LMRDA.

Part III of this Article turns to the question of Congress' intent concerning the application of the LMRDA to the Canadian activity of American international unions. Although, not surprisingly, Congress did not directly confront the problem, it will be argued that a congressional intent can be judicially reconstructed. This congressional intent rests on three sources. First, Congress had information about the interrelation by international unions of their Canadian and United States activities. Second, Congress had purposes in enacting the LMRDA. Third, Congress' general concerns, questions, and frame of mind in 1959 permit a strong subjective sense—an express element of the analysis of some courts—of what Congress would have done had it been forced to confront the problem.

Based on these three sources, the article will conclude that anti-democratic activities by an all-Canadian cast—say, the trial committee of a Canadian local—must remain beyond the scope of the LMRDA as applied by the courts of the United States. Among other problems, it is unclear how an American court would acquire personal jurisdiction of the defendants.¹² However, and going beyond existing judicial applications, this article will argue that international unions which are bound by the LMRDA must apply that law to their Canadian as well as United States activities. Specifically, an international which affirms discipline imposed by a Canadian local, discipline which would have violated the LMRDA if imposed by an American local, commits an independent LMRDA violation remediable in American courts.

I. STATEMENT OF THE PROBLEM

Canada is unique in the world in having a substantial proportion of its workforce organized in unions with headquarters in another country.¹³ In a

12. Compare, however, the possibility of application of the LMRDA by a Canadian court having jurisdiction of the subject matter and of the parties, *supra* note 5.

13. In 1983, the time of the most recent official analysis of union membership, 41.8% of Canadian unionists were represented by international unions, 42.7% by Canadian national or regional unions, and 15.5% by governmental employee organizations, which might also be classed as Canadian national organizations. STATISTICS CANADA, ANNUAL REPORT OF THE MINISTER OF SUPPLY AND SERVICES CANADA UNDER THE CORPORATIONS AND LABOUR UNIONS RETURNS ACT, PART II, LABOUR UNIONS 18 text table I (Cat. 71-202) (1983). The same report documents the gradual rise of Canadian national union density

way, it is surprising that this state of affairs has not engendered more legal conflict before, although as indicated there are signs that more conflict is foreseeable.¹⁴ So far as I can discover, the Bill of Rights of Members of Labor Organizations has been applied to protect Canadian unionists only once, in an unreported district court opinion.¹⁵ Consequently, the subject of this article is essentially one of first impression.

and decrease in international density; for example in 1962, 66.8% of union members were in international unions and only 21.4% in Canadian national unions. *Id.* at 26 figure 1. United States observers should bear in mind that these represent shares of a growing, not shrinking, labor movement, which as of 1984 represented 39.6% of all nonagricultural paid workers. Labour Canada, Press Release No. 21/84 (June 26, 1984) (on file in the library of the Canadian Consulate General, New York, New York).

The proportion of Canadian unionists in Canadian unions has risen since the last official report. The press release referred to above, while unfortunately not presenting information permitting direct comparison with the 1982 report, documents greater growth in the unions affiliated only with the Canadian-only federations than in those affiliated with the AFL-CIO (there is, however, a large group impossible to sort). Moreover, since that press release, Canadians in the United Automobile Workers have split off to form a separate Canadian organization, following the earlier lead of the much smaller Paperworkers, Oil, Chemical and Atomic Workers, and International Union of Electrical Workers (IUE). *Separation of U.S., Canadian Auto Workers*, 117 Lab. Rel. Rep. (BNA) 301 (Dec. 17, 1984).

The reader interested in analysis of this internationally unique phenomenon might consult two books with opposite positions. J. CRISPO, *INTERNATIONAL UNIONISM: A STUDY IN CANADIAN-AMERICAN RELATIONS* (1967) is the leading defense of the institution, finding that it has benefited Canadian workers. More skeptical is I. ABELLA, *NATIONALISM, COMMUNISM, AND CANADIAN LABOUR: THE CIO, THE COMMUNIST PARTY, AND THE CANADIAN CONGRESS OF LABOUR 1935-1956* (1973). While Abella's study is historical, he finds few benefits to Canadian workers in international unionism. Indeed, perhaps the main theme of his study is the relatively shallow roots of the institution of international unionism. However, every time a majority seemed to form to create an all-Canadian national labor movement, that majority would in turn break apart over the issue of communism. My thanks to Brian Langille for calling my attention to this very interesting study.

14. See *supra* note 6 and accompanying text.

15. *Boswell v. International Bhd. of Elec. Workers, Local 164*, 106 L.R.R.M. (BNA) 2713 (D.N.J. 1981), terminated in a consent order under which the international union agreed to amend its constitution and not to discipline members under the old clauses, which had been routinely used to punish free speech. At the time of the consent order, three electricians in British Columbia had pending appeals within the union from discipline imposed under the disputed sections. They had already paid fines of \$1000 each pending their appeals. When the consent order became effective, the international union vacated the disciplinary decision of the trial board but refused to refund the fines paid. The three British Columbians moved to intervene in the LMRDA proceeding; the original United States plaintiffs moved to hold the international in contempt of the consent order and for other monetary and injunctive relief; and the international moved for an interpretation of the consent order. By an unpublished opinion, the court ordered the IBEW to refund the fines paid by the British Columbia electricians. Based on representation by the IBEW's counsel that refunds would be forthcoming, the court denied any contempt sanctions. The court did not technically address the issue of intervention by the Canadians, preferring instead to grant the motion filed by the original United States plaintiffs. However, the court indicated that: "[i]f there were no other way to bring the contempt motion before the court, Rhodes, Yorke and Duffy [the British Columbia electricians] would have been permitted to intervene pursuant to Fed. R. Civ. P. 24(b) for purposes of making the motion." *Boswell v. International Bhd. of Elec. Workers, Local 164*, No. 79-2571, slip. op. at 7 n.1 (D.N.J. Jan. 20, 1982).

The issue of extraterritoriality was expressly reserved in *Pawlak v. Greenawalt*, 628 F.2d 826, 831 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981), where the court enjoined an international union from

II. BASES FOR UNITED STATES JURISDICTION OVER A CANADIAN NATIONAL'S SUIT AGAINST AN INTERNATIONAL UNION: ANALOGIC THEORIES AND VOCABULARIES

Let us hypothesize a suit of the following character. The plaintiff is a Canadian national and member of an international union such as the Teamsters, Steelworkers, or International Brotherhood of Electrical Workers. The plaintiff alleges that he has been disciplined by his Canadian local for reasons, or in a manner which violates the LMRDA. For example, he has been disciplined for exercising free speech, criticizing union officials,¹⁶ or advocating disfavored political ideas.¹⁷ Alternatively, the trial board consisted of his political opponents,¹⁸ or lacked any evidence supporting its finding of guilt.¹⁹ He has appealed the conviction to the international union, but without obtaining a reversal. He now sues the international union of which he is a member, in the federal district court for the district in which the union maintains its principal office.²⁰ The union will presumably move to dismiss the member's suit, and the judge will presumably ask herself or himself in any event: "Do I have to hear this thing?"

The purpose of this section is to demonstrate that the answer to that question must be: "Yes, if Congress intended you to." This conclusion is not supposed to be controversial. It is often stated by American courts with an air of stating uncontroversial truth that they must hear cases which Congress has lodged with them even if Congress' decision to do so violates

acting under a clause of its constitution, but construed the decree as reaching only discipline against United States unionists so as to avoid the question of whether the injunction might reach discipline against foreign unionists.

16. *Petramale v. Local 17, Laborers Int'l Union*, 736 F.2d 13, 16 (2d Cir.), *cert. denied*, 105 S. Ct. 593 (1984); *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963).

17. *Turner v. Air Transport Lodge 1894*, 590 F.2d 409 (2d Cir. 1978), *cert. denied*, 442 U.S. 919 (1979).

18. *Goodman v. Laborers Int'l Union*, 742 F.2d 780 (3d Cir. 1984); *Semancik v. United Mine Workers Dist. No. 5*, 466 F.2d 144 (3d Cir. 1972).

19. *Vars v. International Bhd. of Boilermakers*, 320 F.2d 576, 578-79 (2d Cir. 1963); *accord International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 245-46 (1971) (dictum).

20. LMRDA § 102, 29 U.S.C. § 412 (1982).

I have chosen a hypothetical suit under Title I simply because under that title the affected union member sues directly, and thus frames the suit herself. The remarks should apply equally to individual actions to enforce Title III (trusteeships) or Title V (fiduciary obligations of officers).

Title III (trusteeships) may be, and Title IV (union elections) must be enforced by the United States Department of Labor. The Department's position since the LMRDA was enacted has been that the Act applies to the conduct of United States-based international unions when they impose a trusteeship on a Canadian local, 29 C.F.R. § 451.6(c), or when they conduct an election in which Canadians vote. 29 C.F.R. § 451.6(b). There has been little action under these regulations, however, and Department policy might change, so for simplicity I have chosen to discuss a hypothetical action under Titles I, III, or V.

international law.²¹ (By contrast, in Part III, I will argue that Congress intended federal courts to apply the LMRDA to actions by an international union toward a Canadian member; this conclusion is concededly arguable.)

Nevertheless it is worth establishing with care the supremacy of congressional intent, as established in the context of other statutes, for two reasons. First, one suspects that a normal judicial reaction will be: "This stuff all happened in Canada. It doesn't belong in this court." It is important to show that the first sentence uttered by the judge does not imply the second. Second, it should be obvious that "congressional intent" is going to turn out to be a term of art. So as we watch courts establishing that the answer to their question is something denominated "congressional intent," we can conveniently also observe, legal-realist style, what evidence and assumptions have guided the search for congressional intent as to other statutes.

The well-counseled plaintiff will argue that at least three theories support the application of the LMRDA to the situation described. First, he will argue a "nationality" theory: that the LMRDA applies to regulate the activities of the unions to which it applies as American nationals, regardless of where those activities are carried out. Second, he will argue an "objective territorial" or "domestic effects" theory: that the LMRDA applies because of the effect the union's antidemocratic activity in Canada will have on the political life of United States locals. Third, most simply and directly, he will argue that he is a member of the International and is suing to require the International to follow a statute by which it is bound under choice of law rules. All of these theories of jurisdiction boil down to the question of the substantive intent of Congress in enacting the LMRDA. As stated, I believe that the third is much the simplest and most convincing, and believe that the hypothetical federal district court will think so, too. However, nothing is certain and therefore the nationality and objective territorial theories also will be surveyed.

21. See, e.g., *Leasco Data Processing Equip. Co. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (Friendly, J.) ("If Congress has expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment."); *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.). This is another way of putting the point that the United States subscribes to a "dualist" theory of the relationship between international and municipal law, under which the former is not supreme in domestic courts. See generally I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 33-34 (3d ed. 1979).

A. *Regulatory Jurisdiction Over American Nationals Abroad:
Analogies from Trade Regulation*

A state has jurisdiction to prescribe the law relating to the foreign activities of its own nationals.²² Let me illustrate the principle with a strong hypothetical before turning to its rather less exciting actual applications. In theory, Congress could write a code of conduct covering the activities abroad of American multinational corporations. Whatever the code's status in international law, and however foreign governments might complain, American courts would be bound to enforce it.

The nationality jurisdiction principle has been recognized by the Supreme Court in cases regarding the obligation of American citizens permanently domiciled abroad to respond to the subpoenas of a United States court²³ or to pay congressionally-imposed tax on income received from real property located abroad.²⁴ An interesting and fruitful line of cases applies this principle to regulate certain unfair trade practices carried on by Americans in foreign countries, even if no domestic consequences of their activity can be demonstrated. This is obviously an important analogy to the plaintiffs in our hypothetical case, who may similarly wish to argue that the LMRDA is Congress' attempt to regulate unfair practices found in American unions, wherever the unfair practices were carried out, and however speculative their domestic effects.

The seminal Supreme Court case, *Steele v. Bulova Watch Co.*,²⁵ is not unambiguous. It relies largely on the American nationality of the regulatee, but there were also some domestic consequences of his illegal activity, and both aspects of the case have been fruitful of subsequent decisions. An American citizen and resident assembled and sold in Mexico watches bearing a spurious trademark. This was found to be trademark infringement and unfair competition under United States law. Great stress was laid on the defendant's American nationality. "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States. . . . Resolution of the jurisdictional issue in this case therefore depends on construction of exercised congressional power, not the limitations upon that power itself."²⁶ How did the Court conclude that Congress had intended to "project the impact of its laws"? The Court's conclusion rested on three bases. First,

22. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(1) (1965); RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402(2) (Tent. Draft No. 6, 1985).

23. *Blackmer v. United States*, 284 U.S. 421, 436 (1932).

24. *Cook v. Tait*, 265 U.S. 47, 54-56 (1924).

25. 344 U.S. 280 (1952).

26. *Steele*, 344 U.S. at 282-83.

the Court considered Congress' general purposes in regulating trademark infringement and unfair competition. Second, the Court found some slight effects on American commerce: some components for the watch were purchased in the United States, and some of the spurious Bulovas found their way back into the United States. Third, a contrary decision would have created the possibility of a foreign sanctuary for conduct illegal in America.²⁷ Even more important, perhaps, though the Court did not discuss it, may have been the fact that the plaintiff, victim of the unfair competition, was an American corporation.

Steele is frequently cited on almost any issue relating to American statutes and foreign conduct; most of the subsequent cases in this and the next section of this article cite *Steele*. It has rarely been necessary to determine whether *Steele* is primarily a case of regulating foreign conduct because of its domestic effects, or because of the nationality of the regulatee. There have been attempts to treat *Steele* as a domestic effects case.²⁸ This seems to me to be the less sound reading of *Steele*, for three reasons. First, as we shall see in the next section, founding prescriptive jurisdiction over foreign conduct on the basis of its domestic effects is less firmly established even in American law than is jurisdiction based on nationality. "Effects" jurisdiction is horribly problematic in international law, where nationality jurisdiction is well-established. It makes little sense to read *Steele* so as to rest on a less firm basis. Second, the "domestic effects" reading of *Steele* does violence to its language. Once *Steele* is read as a case of jurisdiction on the basis of domestic effects, the fact that defendant is an American national is of no importance whatever. Under the domestic effects theory, one can reach foreign infringement by foreign nationals of United States-registered trademarks on the basis of sales lost to the United States plaintiff.²⁹ This may be a good thing to do, and for this purpose the doctrine of jurisdiction on the basis of domestic effects should be used, as discussed in the next section. *Steele*, however, laid great stress on the American nationality of the defendant, and something must have been meant by it. Third, *Steele* has not been applied to a foreign defendant, in a case in which the court expressly refused to look at the domestic effects of

27. *Id.* at 285–87.

28. *American Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n*, 701 F.2d 408 (5th Cir. 1983), enjoins infringement of a United States-registered trademark by a United States cooperative where all the acts of infringement took place in Saudi Arabia and none of the products ever came back to the United States. What the court described as the key fact, however, was what I described as the unstressed fourth fact in *Steele*: the victim of the unfair competition, the one whose sales were lost because of the trademark infringement, is American. This fact permitted the court to find "domestic effects" even where no infringing products entered American commerce. *Id.* at 414–15.

29. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 426–29 (9th Cir. 1977) (including *Steele* with the cases on objective territoriality described in the next section).

the foreigner's infringement.³⁰ This was the wrong approach if *Steele* is just another "domestic effects" case. It was the correct approach however if *Steele* represents a different approach, that is, the exercise of jurisdiction over American nationals abroad.³¹

If I am right, then, an American, simply by virtue of being an American, may not go into a foreign country and infringe American trademark laws, even if the mislabeled product stays abroad and even if the sales deflected are not from American manufacturers. At least this conclusion is consistent with all the relevant cases and inconsistent with none.³² It is certainly a conclusion pregnant with possibilities for our plaintiffs in the hypothetical suit, for it opens up the analogous conclusion that Congress may similarly have intended that American-regulated unions not be able to break American union regulations in a foreign country. But is not the conclusion a startling one? It is said to rest on Congressional intent. Why might Congress have intended to make Americans carry unfair trade laws around with them?

The question must be answered if the strength of the analogy from trademark law is to be evaluated. Unfortunately the answer must be speculative. The cases do not reach very far to find congressional intent beyond the vaguest generalities about the purpose of the legislation. Some speculative answers are plainly too broad and must be rejected. The courts are unwilling to impute to Congress any concern for the welfare of foreign consumers, Arabian rice eaters, or Panamanian whiskey drinkers.³³ Nor is Congress likely to be concerned with the overall morality, the soul as it were, of American marketing personnel. Congress could legislate a moral

30. *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 641-44 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956).

31. The approach suggested in the text was adopted in *Scotch Whiskey Ass'n v. Barton Distilling Co.*, 489 F.2d 809 (7th Cir. 1973), where the court enjoined the placing of false labels by an American bottler on spirits bottled and distributed in Panama. This is the same result as was reached in *American Rice*, discussed *supra* note 28, but the theoretical basis is different. The *Scotch Whisky* holding does not rest on damage to American manufacturers; the plaintiffs represented distillers in Scotland and their very complaint was that the Panamanian bottles didn't contain enough of what had been produced in Scotland. Nor does the holding rest on lost American sales, except for a small quantity in the then-Canal Zone. Rather, the theoretical basis is squarely jurisdiction over nationals: "No principle of international law bars the United States from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. . . . The question is whether Congress intended the [Lanham] Act to apply. . . ." *Id.* at 812.

32. See also *Branch v. Federal Trade Comm'n*, 141 F.2d 31, 35 (7th Cir. 1944) (Minton, J.), wherein the court enjoined an American from marketing phony "diploma mill" correspondence courses in Latin America: "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States."

33. *American Rice*, 701 F.2d at 414; *Branch*, 141 F.2d at 35.

code for all Americans acting abroad, for the image of the nation and the welfare of mankind. But Congress hasn't done so, and Lanham Act violations cannot be seen as the first installment of such a code.

Let me suggest three possible explanations for the surprising Lanham Act result. First, express in *Steele*, is the "foreign sanctuary" concern. We shall encounter this concern again when it comes to the marketing of fraudulent securities. Some activities, here marketing, are highly mobile, and it makes little sense to impute to Congress a regulatory scheme which the American regulatee can so easily evade by a move across the border. This concern has slight application only to the problem of union democracy law.³⁴ The second concern may be called: "What goes around, comes around." That is, the Lanham Act cases may be domestic effect cases with a presumption of domestic effects. People who go abroad and do unsavory things on our small interconnected planet will debase the standards of trade at home over time, in a sort of Gresham's law effect. The third concern may have to do with the concept of registering a trademark as a sort of a promise, even when made to foreigners such as distillers of Scotch whiskey. Our government has told people that it will protect their trademarks. As a practical matter, it can't do so everywhere and anywhere, nor should it try. But when the skunk is an American, and we can get him, we will, to protect the promise we have made in registering trademarks.

The latter two arguments should suggest union democracy analogies. First, shady union practices across our northern border will inevitably erode standards at home. Second, the LMRDA is a sort of governmental promise or commitment to union members to enforce certain standards on American institutions which may affect foreign citizens as a result of their decision to join United States-based unions. In Part III of this article I hope to show that these and related arguments provide a considerably more impressive basis for the conclusion that Congress intended the application of the LMRDA to international unionism in Canada, than anything the courts have come up with to support the similar conclusion under the Lanham Act.³⁵

34. Unions could make it an issue if they denied being American nationals for purposes of international law. If unions were to assert that they flew entirely under flags of convenience, like merchant ships, they might, however, open up the possibility of applying United States law to prevent unions escaping any regulation.

35. There are of course cases in which the courts find that an American acting abroad is not bound to observe American law. These cases also rest on congressional intent. No one doubts that Congress

B. Regulatory Jurisdiction Over American Conduct for Foreign Plaintiffs or Over Foreign Conduct with Domestic Effects: Analogies from Antitrust and Securities Regulation

It is well established that federal courts will on occasion act against conspiracies in restraint of trade or the marketing of fraudulent securities, even where all or most of the conduct was carried on by foreigners in foreign jurisdictions, because of the domestic effects of the conduct. This is known, obscurely, as the “objective territorial” principle of jurisdiction, and the classic example—not, as far as I can discover, based on an actual case—is the gunman in jurisdiction A who fires on and kills someone in jurisdiction B, thereby subjecting himself to the criminal jurisdiction of each locale. The law review literature is extensive—other epithets come to

could have made its law applicable to the conduct in question, and these cases all say so expressly. The conclusion is simply that Congress didn’t so choose. The leading Supreme Court case employs a rather strong “canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, [which] is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions.” *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (refusing to apply the Eight Hour Law to labor performed by an American citizen for an American contractor working for the United States military in a foreign country). As a statement of a general approach this is rather the low water mark of the nationality jurisdiction theory. It is impossible to square with later cases such as *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), discussed *supra* notes 25–27 and accompanying text (which nevertheless cites the presumption). Indeed, some of the justices felt that the case could not be squared with earlier cases either, notably *Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377 (1948) (applying Fair Labor Standards Act to United States military base leased on Bermuda). See *Foley Bros.*, 336 U.S. at 291 (concurring opinion). David Currie has stated that the presumption of territoriality, “loudly and unnecessarily proclaimed by Mr. Justice Holmes, has been an albatross which the [Supreme] Court has struggled to remove ever since.” Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 Sup. Ct. Rev. 34, 57.

More recent cases in the lower courts refusing to exercise jurisdiction on the basis of American nationality, while typically citing *Foley Brothers*, do not actually rest on that presumption, but go considerably farther to find congressional intent. See, e.g., *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977) (Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1375 (1982), does not prohibit a United States citizen from taking dolphins within the territorial waters of a foreign sovereign state, resting on a tradition of negotiation between states directly on these matters; geographic references in the statute limited to the United States and the high seas; a permit system which did not seem to contemplate extraterritorial application; and a legislative history which referred to foreign seal hunts but only in the context of banning imports, not regulating American hunters); *Airline Stewards & Stewardesses Ass’n Int’l v. Trans World Airlines*, 273 F.2d 69 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1960) (Railway Labor Act does not require American carrier to bargain with hostesses and stewards not nationals of United States, all based abroad and used exclusively on flights outside the United States; resting on descent of Act from Interstate Commerce Act which in turn speaks of transportation which “takes place within the United States”).

mind—and for present purposes we need hit only the high points.³⁶ This theory is obviously less useful to our hypothetical plaintiffs than the previous one—the “American nationals” theory—particularly when the two are interrelated. If the respondent in the hypothetical case is not an American national, for example a Canadian local or district, American domestic effects of the local’s antidemocratic conduct will be hard to demonstrate. The principal interest of the antitrust and securities cases for our problem lies, it seems to me, in the method used by the courts to divine the “congressional intent” which assertedly is effectuated when jurisdiction is found, because once again the decision by an American court to assert objective territorial jurisdiction is supposed to be solely because Congress ordered it to do so.

Let me give a few of the leading examples of this sort of statutory application, at the risk of bogging down in a well-ploughed field, before trying to figure out whether they stand for any general theory of statutory interpretation. The leading case, both as to result and, as we shall see, as to judicial method, is *United States v. Aluminum Co. of America (Alcoa)*.³⁷ Almost everything which has followed has been an attempt to come to terms with this great opinion by a great judge, Learned Hand.³⁸ We are here concerned with the portion of the opinion dealing with a cartel of aluminum

36. The law review literature on the application of United States antitrust laws to foreign conduct is, in the opinion of this author, the largest and worst body of law review literature with which I am familiar. If you don’t want to take my word for it, take the word of the compiler of a recent “selective bibliography” which nevertheless runs on for over twenty pages. “Although the literature on extraterritorial application of United States antitrust law is voluminous, its ideas are few and its repetitiveness great. The same propositions are advanced year after year with little noticeable effect one way or the other.” Hood, *The Extraterritorial Application of United States Antitrust Laws: A Selective Bibliography*, 15 VAND. J. TRANSNAT’L L. 765, 767 (1982).

The articles fall into two general classes. Descriptions of legal principles actually applied in the cases, almost never going beyond the language of the cases themselves, are common; in these articles analysis of or even reference to economic, social, or any other values is completely absent. The other class consists of protests against the exercise of American jurisdiction, typically made by foreign officials or by American counsel to foreign enterprises and, while found in law reviews, of the general intellectual caliber of a bar association luncheon address (which many of these articles also were). I read dozens of these articles in order to prepare for this one. I would not wish the experience on anyone; I refuse to cite them, except where I am citing an idea not found in all the other articles.

37. 148 F.2d 416 (2d Cir. 1945). The case has been described as the “first major case in which a court in this country applied a United States law to activities by noncitizens outside this country without an expressed congressional directive.” Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1010 (1976).

38. It is thus amusing to note the possibility that there never was any foreign conduct in the *Alcoa* case, or in any event that Judge Learned Hand did not believe that there was. He dropped numerous hints to his own predilection that the nominally Canadian company, Aluminum Limited, was both functionally at one with the American firm Alcoa and, even if viewed as independent, essentially an American enterprise. The trial judge had found to the contrary, however, and a reversal of these factual findings would have raised the possibility of additional hearings. Trial of the case had already consumed two years and resulted in 40,000 pages of testimony. It has therefore been suggested that Hand’s venture into

producers, organized as a Swiss corporation with the participation of European aluminum companies and Aluminum Limited, a Canadian corporation originally founded by Alcoa and still owned largely by Alcoa's owners, but found by the district judge to be independently operated. The cartel violated United States antitrust laws. Hand's test would apply the Sherman Act to foreign agreements intended to affect United States imports or exports and which actually did affect them³⁹—the broadest of any of the formulations essayed in the area. Why? The preparatory steps dance to an ostinato motif of congressional intent which disappears from the score once the pirouette actually begins.⁴⁰ It is a cliché to observe that the Sherman Act Congress could hardly have foreseen or addressed the rise of the world economy;⁴¹ impeccably the stylist as ever, Hand spares us even this wan cliché. So what sort of lawmaking is going on here, and what does Congress have to do with it?

Earlier in the opinion there is a clue both revealing and mysterious. In a famous if currently unfashionable passage, Hand rejects Alcoa's contention that a monopoly might be permissible if it realized only the profit which would have obtained under competition. The Act, to paraphrase Hand, has wider purposes; competition has other benefits besides lower prices; it may lead to innovation, energy; Congress could prefer a system of small producers on democratic grounds. "These considerations, which we have suggested only as possible purposes of the Act, we think the *decisions prove* to have been in fact its purposes."⁴² How can the decisions prove what were an act's purposes "in fact"?

The Supreme Court has cited *Alcoa* with approval and applied it to what might seem the reverse situation, a conspiracy conducted in Canada to

the law applicable to foreign actors was an attempt to reverse an unsympathetic finding of fact. 1 J. ATWOOD & K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 6.05, at 148-49 (2d ed. 1981).

39. *Alcoa*, 148 F.2d at 444.

40. Preparation:

[W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.

Id. Note the three references to Congress in four sentences. By contrast, the passages actually stating the holding are entirely unadorned by any reference to any congressional materials, legislation, hearings, or even speeches.

41. See generally Picciotto, *Jurisdictional Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11 (1983).

42. *Alcoa*, 148 F.2d at 427 (emphasis supplied).

exclude an American producer from the Canadian market. This allegation was held to state a claim under the Sherman Act and a directed verdict for the defendant was reversed. The decision cites *Steele, Alcoa*, and academic authorities. It makes no reference to any legislative materials, or anything which could be described as policy.⁴³

These decisions, and other artifacts of the expansive era of American antitrust law,⁴⁴ created considerable consternation in foreign business and governmental circles and in the academy. While the doctrine of jurisdiction on the basis of domestic effects, or "objective territorial jurisdiction," is not unknown to international law, it is controversial, and many foreign governments do not recognize it.⁴⁵ A search began for a formula to limit the exercise of jurisdiction even in cases of conduct with domestic effects. While no single formula has won complete adherence—indeed, as we shall see, some courts and academic authorities still prefer Hand's simple test of intent plus domestic effects—two are worth identifying as potentially appealing formulas in the solution of our underlying problem. The less successful is the approach of the drafters of the Restatement (Second) of Foreign Relations Law, who recognized objective territorial jurisdiction but only in the case of "substantial effects" which are the "direct and foreseeable result" of the activity regulated; moreover, the antitrust violation and its effect must each be "constituent elements of the activity regulated."⁴⁶ This formula has not been particularly influential; as words of limitation go these are more desperate than compelling.⁴⁷

Altogether more interesting is the "comity" or "balancing of interests" approach, in which an initial finding, or assumption *arguendo*, of domestic

43. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702–08 (1962).

The Supreme Court has also expressly held that foreign plaintiffs may sue American entities in American courts for antitrust injuries sustained. *Pfizer, Inc. v. India*, 434 U.S. 308, 315 (1978).

44. *United States v. Watchmakers of Switz. Information Center*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965); *United States v. Imperial Chemical Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951), *decree*, 105 F. Supp. 215 (S.D.N.Y. 1952).

45. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402 comment d (Tent. Draft No. 6, 1985).

46. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). The ongoing revision simplifies this wording. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 402(1)(c) (Tent. Draft No. 6, 1985).

47. *But see* Export Trading Company Act of 1982, § 402, 15 U.S.C. §§ 6(a), 45(a) (1982) (excluding from the reach of the Sherman and Federal Trade Commission Acts conduct having no "direct, substantial, and reasonably foreseeable effect" on United States domestic commerce, import commerce, or the export opportunities of a United States national). The intent of the legislation was to clarify, not change, the prevailing judicial standard. *See* H.R. REP. NO. 686, 97th Cong., 2d Sess. 5–6 (1982). The legislation has not had the desired pacificatory effect on foreign governments and enterprises as a result of simultaneous executive decisions which undercut its symbolic message. *See* Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORD. L. REV. 350, 351 (1983).

effects is then discounted by a series of factors, expressly including comity with other nations and international law considerations.⁴⁸ The compilation and balancing of multiple "interests" so as to distinguish false from true conflicts is expressly patterned on postwar choice of law theory.⁴⁹ It is important to see that this approach borrows expressly from choice of law theory but does not go whole hog. The court does not conceive itself as actually making a choice of law decision on this view. Rather, it is deciding whether it has subject matter jurisdiction, and, if it decides that comity and international fairness militate against the application of United States law, that constitutes a dismissal for want of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).⁵⁰

The comity test is an appealing one for a court concerned about foreign sensibilities. The factors which discount the exercise of jurisdiction include "political" factors such as how much noise and complaining foreign governments have made or are likely to make.⁵¹ This may make this

48. This approach was first suggested in *K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD* 306 (1958), where it bore the unfortunate name "jurisdictional rule of reason." The most influential case which expressly relies on *Brewster* is *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976), *on remand*, 574 F. Supp. 1453 (N.D. Cal. 1983) (dismissing complaint), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3514 (1985). Three circuits have adopted essentially the *Timberlane* approach, and any modifications would take us too far afield here. *See Industrial Inv. Dev. Corp. v. Mitsui & Co. Ltd.*, 671 F.2d 876, 884 (5th Cir. 1982), *vacated and remanded on other grounds* (standing), 460 U.S. 1007, *aff'd on remand*, 704 F.2d 785 (5th Cir.), *cert. denied*, 104 S. Ct. 393 (1983); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869, 871 (10th Cir.), *cert. denied*, 455 U.S. 1001 (1981); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296-97 (3d Cir. 1979); *see also* 1 J. ATWOOD & K. BREWSTER, *supra* note 38, § 6.11, at 163 ("[i]t is . . . likely that the *Timberlane* approach . . . will be influential if not controlling in foreign commerce litigation for some time to come."). *But see* *Laker Airways Ltd. v. Sabena, Belg. World Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984) (rejecting the interest balancing approach, noting scholarly criticism of the concept, and characterizing it as having "not gained more than a temporary foothold in domestic law").

49. Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586 (1961).

50. *Timberlane*, 749 F.2d 1378, 1381-82 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3514 (1985). Presumably the court cannot retain the case and apply foreign law, as it might if the problem were one of the choice of law. There is a dispute, however, about whether the court must dismiss; that is, whether the *Timberlane* doctrine is one of abstention or of subject matter jurisdiction. In *Timberlane* itself, the court found that the factors of comity weighed against jurisdiction. There is a dispute whether this represented abstention from exercising jurisdiction, presumably a discretionary judgment, *see Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982), or whether the comity analysis is rather part of the threshold test for exercising subject matter jurisdiction. *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1299 (3d Cir. 1979) (Adams, J., concurring).

51. *See Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283 (1982). The seven factors identified in *Timberlane* as relevant to the comity analysis are: the degree of conflict with foreign law or policy; the nationality or allegiance of the parties and the location or principal place of business of corporations; the extent to which enforcement by either state can be expected to achieve compliance; the relative significance of effects on the United States as compared with those elsewhere; the extent to which there is explicit purpose to harm or affect American commerce; the foreseeability of such effect; and the

approach attractive to a court hearing our hypothetical LMRDA case which thinks that the Canadian plaintiffs have a good case on the merits but is worried about Canadian sensibilities. It must be said, however, that there has been little inclination in the courts to borrow doctrines and concepts used to solve problems of extraterritoriality from one substantive law area to another. On our underlying metaproblem of how courts justify adopting one analysis or another, adhering to a norm of congressional intent in the face of congressional silence, the interest balancing approach offers little assistance. The case which originated it cites much academic, and no legislative, authority.⁵²

Securities regulation has also been applied to protect some foreign investors and to restrain some foreign conduct, in each case on the basis of the domestic effects of the conduct. A line of cases in the United States Court of Appeals for the Second Circuit has developed the principles. We may deal here only with the most recent, which addresses both problems, as well as the metaproblem of "congressional intent," the latter in a most frank and interesting way.⁵³ After the collapse of the financial empire of Bernard Cornfeld and Investors Overseas Services, foreign and American plaintiffs sued a truly multinational cast of defendants in an American court, alleging causes of action under the Securities Act of 1933. The court recognized several theories under which foreign plaintiffs could conceivably proceed, only some of which were applicable on the facts. Inapplicable was nationality jurisdiction; the defendants could not be described as American nationals. Securities fraud actually committed in the United States was an easy case (raised in a companion case); anyone who purchased such securities could sue in federal court, even foreigners and even if the securities were not peddled to Americans at all.⁵⁴ The harder issue

relative importance to the violations charged of conduct within the United States as compared with conduct abroad. *Timberlane*, 549 F.2d at 614. See also *Timberlane*, 749 F.2d at 1384-86. Both "conflict with foreign governmental policy" and "obstacles to compliance" seem to stand in as measures of the sensibilities of the relevant foreign government, particularly as used in *Timberlane*. See, e.g., *Timberlane*, 549 F.2d. at 614 (concern expressed with "likely sore spot[s]").

How can anyone find international law to be otherworldly or ivory tower-like? This kind of express evaluation of political reaction makes obvious what is so often undertaken sub silentio and goes some way in implementing the legal vision of the Critical Legal Studies movement. It goes only a little way, because the political arguments are one-sided. Political reaction is an argument for stasis, but there is no countervailing way in which a political argument may be made for action. Still, judicial realism about politics is rare enough that one should encourage it when it emerges.

52. *Timberlane*, 549 F.2d at 608-15.

53. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975). Among the surveys of the area are Hacker & Rotunda, *The Extraterritorial Regulation of Foreign Business Under the United States Securities Law*, 59 N.C.L. REV. 643 (1981); Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT'L L.J. 137 (1978); Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553 (1976).

54. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) ("We do not think Congress intended to

was the elusive subject of this section, objective territorial jurisdiction, or the regulation by American courts of foreign-based activity on the basis of the latter's domestic effects. The court held the possible effects of the foreign-based activity insufficient to support jurisdiction. If the foreign fraud depressed domestic stock prices or involved significant amounts of United States-based activity, a different case might be presented. Long-run adverse effects of a speculative nature did not suffice to make the foreign activity into American securities fraud.⁵⁵

The analogy to the LMRDA is quite direct, should a court choose to draw it. Antidemocratic activity carried on in America, or by an American entity, is actionable, and the foreign nationality of the plaintiff no obstacle. If the only basis of American jurisdiction is alleged effects of undemocratic behavior in Canada on labor relations in the United States, plaintiffs had better be prepared to show specific effects, not just a general lowering of standards.

Equally interesting for our purposes was the coup de grace which this case delivered to an inconclusive series of arguments from legislative intent.⁵⁶ Judge Friendly wrote for the court, and he was nothing if not frank about the sources of the holdings summarized above:

We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond. The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later. We recognize also that reasonable men might conclude that the coverage was greater, or less, than has been outlined in this opinion and in *ITT [sic] v. Vencap, Ltd.*, 519 F.2d 1001 (2 Cir 1975) this day decided. Our conclusions rest on case law and commentary concerning the application of the securities laws and other statutes to situations with foreign elements and on our best

allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."'). The court noted that this holding applied only to the perpetration of fraud, not to mere preparatory actions or a failure to prevent foreign frauds.

55. *Bersch*, 519 F.2d at 989.

56. Earlier cases in the Second Circuit had attempted to gloss section 30(b) of the Securities and Exchange Act, 15 U.S.C. § 78dd(b)(1982), exempting from the Act certain transactions on foreign stock exchanges. The earliest encounter with extraterritoriality, *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208, *rev'd in part on other grounds*, 405 F.2d 415 (2d Cir.) (en banc), *cert. denied*, 395 U.S. 906 (1969), relied heavily on this section as its main legislative holding. By exempting some transactions from the registration and reporting requirements, Congress was thought to have indicated its intent that some aspects of the Act, namely the antifraud provisions, apply to these transactions. The later case of *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1336 n.6 (2d Cir. 1972), turned this argument neatly onto its head. This legislative history was "of little relevance" and proved only that the scope of the antifraud provisions was not to be guided at all by congressional action on registration and reporting.

judgment as to what Congress would have wished if these problems had occurred to it.⁵⁷

Summing up then the lessons learned from our brief survey of analogous problems under other federal statutes, we can conclude that federal courts must entertain suits by foreign plaintiffs, or concerning foreign conduct, if Congress intended them to do so. Where, as is typical, congressional materials do not directly address this question, the court should study the background of the statute so as to make an informed judgment about what Congress would likely have wanted had it addressed the problem. This must be decided on an issue-by-issue, statute-by-statute basis, and there is thus little call for, say, a general theory of extraterritoriality. Some conclusions which courts have reached under other statutes, under appropriate circumstances, are that Congress would have wanted the statute applied to all conduct by American nationals; or to conduct carried out from an American base which harms foreigners; or to conduct carried out by foreigners in foreign countries with significant and demonstrable domestic effects.

57. *Bersch*, 519 F.2d at 993. Once again the international law context enables the cat to be let out of the bag. Cf. *supra* note 51 and accompanying text. Of course Judge Friendly is correct, like Judge Hand in *Alcoa*. When the statute is elderly, congressional revision unlikely, and express congressional attention to the problem unlikely, what alternative is there to the course taken? On the one hand, the court could refuse to address the problem at all until Congress tells it what to do. This could mean a long wait for little guidance on a pressing problem. Alternatively, the court, if as self-confident as Judge Hand or Judge Friendly, makes its best guess as to what Congress might have wanted.

This "best judgment as to what Congress would have wished" is an important but poorly understood judicial technique. It is not—really not—the same as the judge imposing the solution she prefers on personal grounds. It is rather an act of empathetic identification in which the judge studies the legislative materials which exist, not to "answer the problem," but to facilitate the ability to empathize with Congress, to understand its concerns, its fears, and the conceptual apparatus and vocabulary which Congress brought to bear on the problem. The judge must also be self-conscious, however, since all this learning only informs, but can never substitute for, the judge's own ultimate decision. Cf. Borges, *Pierre Menard, Author of the Quixote*, in *Labyrinth: Selected Stories and Other Writings* 36, 40 (D. Yates & J. Irby eds, 1964):

The first method he conceived was relatively simple. Know Spanish well, recover the Catholic faith, fight against the Moors or the Turk, forget the history of Europe between the years 1602 and 1918, be Miguel de Cervantes. Pierre Menard studied this procedure (I know he attained a fairly accurate command of seventeenth-century Spanish) but discarded it as too easy. . . . To be, in some way, Cervantes and reach the *Quixote* seemed less arduous to him—and, consequently, less interesting—than to go on being Pierre Menard and reach the *Quixote* through the experiences of Pierre Menard.

Some recent work of the Conference on Critical Legal Studies suggests that this model of empathetic identification may describe much good judging more accurately than models of following rules or making political theory, but I cannot pursue the point here. See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 624–49 (1982).

In Part III of this article we turn to the question of what the LMRDA Congress might have wished. Before doing so, however, it is necessary to examine an alternative approach under which all the problems of Parts II.A and II.B are simply avoided.

C. Jurisdiction Treated As a Problem in the Choice of Law: Analogies from the Jones Act

The Jones Act creates a federal cause of action at law for the benefit of seamen against their employers.⁵⁸ When seamen who are foreign nationals sue shipowners who are foreign nationals, sometimes they are not permitted to sue and sometimes they are. What is interesting for our purposes is that the relevant Supreme Court cases are utterly free of the language of subject matter jurisdiction, extraterritoriality, comity, and the like. Assuming that the foreign plaintiff has achieved valid personal service of the defendant—not difficult in the case of an international shipowner—the only remaining question is conceptualized as choice of law, the law governing the relationship.⁵⁹

58. Merchant Marine Act of 1920, 41 Stat. 988, 1007 (codified at 46 U.S.C. § 688 (1982)).

59. The two leading Supreme Court cases are much commented and do not require extensive treatment here. *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953), first conceptualized the problem as one of choice of law. "A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." The plaintiff in *Lauritzen* was a Dane working on a Danish ship, the injury complained of occurred in Cuba, and the only contact with the United States was a stop in New York at which time the seaman signed a contract of employment. The Court held the Jones Act inapplicable. The case is today cited largely for its discussion of seven factors relevant to choice of law in a maritime tort case, namely: (1) the place of the wrongful act, (2) the ship's flag, (3) the allegiance of the claimant, (4) the allegiance of the shipowner, (5) the place of the contract, (6) the inaccessibility of a foreign forum, and (7) the laws of the forum, particularly with respect to the choice of law question. *Id.* at 583–91.

Seventeen years later in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970), the Supreme Court, while preserving the choice-of-law approach, modified it from one of weighing factors to one of national interest. In *Rhoditis*, a Greek seaman signed on a Greek flag ship in Greece and was injured in New Orleans. The ship was owned by a Panamanian corporation, managed by a Greek corporation, with its largest office in New York and offices in other United States cities as well, including New Orleans. Over 95% of the stock of the management corporation was owned by an individual, a Greek national domiciled in the United States. Thus, of the seven *Lauritzen* factors, four favored the shipowner. Nevertheless, the Supreme Court (5-3) permitted suit under the Jones Act. At the narrowest level, the Court indicated that the list of seven factors was not exhaustive, and added an eighth—the shipowner's base of operations. *Id.* at 309. However, the Court cautioned against an approach of mechanically weighing factors. Central to the Court's analysis was its perception that the defendant was essentially "engaged in an extensive business operation in this country," *id.* at 310,—all of its business involved shipments to or from the United States—and ought not to be permitted "advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act employer." *Id.* See generally Note, *Keeping Up with the Jones Act: The Effect of United States Based Stock Ownership on the Applicability of the Jones Act to Foreign Seamen*, 15 N.Y.U. J. INT'L L. & POL. 141 (1982); Note, *Striking the Colors: Choice of Law Under the Jones Act*, 21 VA. J. INT'L L. 577 (1981).

It is not easy to explain the different approaches to foreign plaintiffs between the Jones Act and, say, the Securities Acts or Antitrust Acts. A genuine and not at all cynical answer is that the Jones Act cases have not aroused significant foreign protest. There is thus no need to have a “jurisdictional” inquiry in which jurisdiction is discounted by factors including foreign reaction. Perhaps the Jones Act approach is unique to that statute, designed subconsciously to deal with the problem of defendants, ships or shipowners, whose nationality is entirely a matter of convenience.⁶⁰ Obviously, however, if the Jones Act approach is not unique to that statute, it yields a simple analogy to our hypothetical LMRDA case.⁶¹ The court may simply hear the Canadian member’s LMRDA case on the merits. By hypothesis, the suit is in the federal district in which the international union maintains its principal office, so there will be no problem with personal jurisdiction. The Canadian will be complaining of the international’s own conduct, performed in the United States. All relevant choice of law factors will call for the application of American law with the sole exception of plaintiff’s nationality.⁶²

III. THE LMRDA AND THE INTERNATIONAL UNION

We have now gone a very long way around the barn to arrive where you knew we were going: the question of Congress’ purposes or intent in

60. Cutting against this explanation is the line of cases in the Supreme Court dealing with the application of the National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151–159 (1982), either to foreign flag ships or to ancillary United States longshoring and stevedoring work. As to shipping, the Court has been steadfast that the NLRA does not apply to foreign flag vessels with foreign crews, even while the vessel is physically in an American port. Thus, most obviously, the National Labor Relations Board (NLRB) may not conduct an election. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). The remaining shipping cases are not about extraterritoriality or comity at all; they are about federal preemption of state injunctive proceedings, and the only effect of holding the ships beyond the NLRA is to permit a state or federal (admiralty) injunction against the picketing. *Windward Shipping (London) v. American Radio Ass’n*, 415 U.S. 104 (1974); *Inces SS Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

The longshoring and stevedoring cases are a dismal lot in which those activities are in commerce when they can be found to be union unfair labor practices, *see International Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212 (1982) (longshoremen’s refusal to handle cargo is a secondary boycott), and are not in commerce when the state court wants to enjoin them. *American Radio Ass’n v. Mobile SS Ass’n*, 419 U.S. 215 (1974) (stevedoring companies may enjoin employees’ strike as state tort since the employers would be unable to get the matter before the NLRB). The neutral principle is that the union always loses. *But see International Longshoremen’s Ass’n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970) (longshoremen are in commerce, not enjoinable by state court, when they protest low wages paid United States longshoremen).

61. *See supra* text accompanying notes 16–20.

62. Not by itself disqualifying. *See, e.g., Pfizer Inc. v. India*, 434 U.S. 308 (1978) (antitrust laws); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (securities laws).

enacting the LMRDA. (The sole purpose of our journey in Part II was just to demonstrate that we *must* end up with Congress' intent: there are no methods or approaches endemic to international law which substitute for or avoid that inquiry into Congressional purpose.) The congressional purpose which we seek is not that specifically relating to foreign plaintiffs. However nice it would be to find that purpose, it doesn't exist. Rather, we must reconstruct Congress' likely attitude on the question of foreign plaintiffs from its general purposes in enacting the LMRDA.

These general purposes are easy to identify, at least at a sufficiently high level of abstraction.⁶³ "The Labor-Management Reporting and Disclosure Act of 1959 was the product of congressional concern with widespread abuses of power by union leadership."⁶⁴ The Bill of Rights of Members of Labor Organizations placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood. Such protection was necessary to further the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of their memberships.⁶⁵ "Congress adopted the freedom of speech and assembly provision in order to promote union democracy."⁶⁶ In the words of its congressional sponsor, the bill of rights was to end "autocratic rule by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may be ruled by their free consent, may bring about a regeneration of union leadership."⁶⁷

However pleasant it would be to resolve all problems of interpreting the LMRDA by reference to these sentiments, there is a problem with the Act's interpretation. Intellectual honesty requires that we face the problem, although I do not believe it will impede resolution of the rights of Canadian unionists. The problem is the multiplicity of congressional purposes, as seen in the tension between Congress' investigations and the ultimate legislative product.

Briefly, Senate investigative hearings into financial corruption and misdealing and organized crime infiltration of some unions and management

63. See generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, in 73 HARV. L. REV. 855 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, in 58 MICH. L. REV. 819 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, in 46 VA. L. REV. 195 (1960); Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273 (1962). There is no treatise or hornbook treating the Act overall. Popular introductions from a plaintiff perspective are H. BENSON, *DEMOCRATIC RIGHTS FOR UNION MEMBERS* (1979), and C. SUMMERS & R. RABIN, *THE RIGHTS OF UNION MEMBERS* (2d ed. 1979).

64. *Finnegan v. Leu*, 456 U.S. 431, 435 (1982).

65. *Id.*

66. *United Steelworkers v. Sadlowshi*, 457 U.S. 102, 112 (1982).

67. 105 CONG. REC. 6472 (1959), *LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959*, reprinted in 2 NLRB, at 1099 (1959).

consultants⁶⁸ led to a statute requiring all unions to engage in financial reporting and, in addition, to observe democratic internal procedures: fair and frequent election of officers, protection of the freedom of dissent, and fair disciplinary procedures. This mandated union democracy was, as Clyde Summers has observed, “not directly responsive to the committee’s findings;”⁶⁹ it became law when a congressional majority could be cobbled together, and that majority operated from sharply divergent visions. It included sincere believers in the value of democracy and fair process even in nominally private institutions; crime fighters who believed that democratic procedures might be effective instrumentally in throwing the crooks out; and opponents of the labor movement who thought that democratic unions would be weak and ineffective.⁷⁰ This renders in most cases unusually hollow the search for underlying congressional intent, the method suggested in the oft-repeated admonition of Professor Cox.⁷¹ Interpreting the LMRDA requires more than congressional intent in this sense. There is also much to be gained from study of the investigatory record which preceded legislation, and from study of the statutory text itself.

The statutory text does not, unsurprisingly, resolve the issue of coverage for Canadian unionists. They can presumably sue their international. The substantive provisions of Title I grant rights to “members” or “every member of a labor organization.”⁷² The Canadian teamster or electrician is

68. See SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, INTERIM REP., S. REP. NO. 1417, 85th Cong., 2d Sess. (1958); SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, SECOND INTERIM REP., S. REP. NO. 621, 86th Cong., 1st Sess. (1959); SELECT COMM. IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, FINAL REP., S. REP. NO. 1139, 86th Cong., 2d Sess. (1960); see also *Hearings on Improper Activities in the Labor or Management Field Before the Select Comm. on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess. (1957); 85th Cong., 2d Sess. (1958); 86th Cong., 1st Sess. (1959); 86th Cong., 2d Sess. (1960) (involving over 1500 witnesses and generating 46,000 pages of testimony).

69. Summers, *supra* note 63, at 274.

70. A. MCADAMS, *POWER AND POLITICS IN LABOR LEGISLATION* (1964) reviews the political history of the legislation. See also Summers, *The Political Miracle*, in C. SUMMERS, J. RAUH & H. BENSON, *UNION DEMOCRACY AND LANDRUM-GRIFFIN I* (1986).

71. “[B]ecause much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises . . . the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words.” Cox, *supra* note 63, at 852. Cox played a leading role in shaping the legislation, and may be confident of *his* underlying rationale, but his underlying rationale was not shared by everyone, and no other underlying rationale was either.

There is no question that the bill is poorly drafted. Title I, the Bill of Rights of Members of Labor Organizations, with which this article is primarily concerned, appeared as an amendment on the floor of the Senate, without benefit of committee study; the only relevant legislative aids to interpretation are the Senate debate, which anticipated few of the relevant problems, and the remarks of the subsequent conference committee which kept the title in the Act. The title consists of a series of broadly stated rights, nearly every one then qualified by a proviso which, if read broadly enough, could obliterate the right.

72. LMRDA § 101(a)(1)–(5), 29 U.S.C. § 411(a)(1)–(5) (1982).

a member of the international union, and that union is unquestionably a "labor organization."⁷³ The Canadian may also sue a "conference, general committee, joint or system board, or joint council" subordinate to the international of which he is a member.⁷⁴

Is a Canadian local of the Teamsters, Steelworkers, or IBEW a "labor organization" under the LMRDA? The statute permits two plausible answers: (1) Yes, if any of its members works for an employer who is also an "employer" for purposes of United States labor law; or (2) No, not at all.

The argument for the former reading, that is, that some but not all Canadian locals are United States statutory "labor organizations," is strictly textual. First, the definition of "labor organization" under the LMRDA is intentionally broader than that under the National Labor Relations (Wagner) Act.⁷⁵ Second, the Canadian local is a "labor organization" if membership in it may be enjoyed by "employees."⁷⁶ Third, an "employee" is "any individual employed by an employer."⁷⁷ Fourth, an employer at least includes American corporations in domestic United States commerce or engaged in United States-Canadian trade.⁷⁸ The result of this chain of textual references is that a Canadian local enrolling as a member any United States statutory "employees," such as employees of United States corporations, or truck drivers hauling between United States and Canadian cities, would be governed by the LMRDA as to relations with all of its members including those who are not statutory "employees." This is the test used to apply the LMRDA to some United States locals consisting largely (but not entirely) of public employees.⁷⁹

While this resolution cannot be ruled out, it seems haphazard at the least, subjecting an almost arbitrarily selected set of Canadian locals to two different bodies of law. In my view, examining Congress' understanding of

73. LMRDA § 3(j)(2), 29 U.S.C. § 402(j)(2) (1982).

74. LMRDA § 3(j)(5), 29 U.S.C. § 403(j)(5) (1982). There may be problems obtaining personal jurisdiction of a Canadian conference or council if it is relatively autonomous. If merely an administrative arm of the international, it might be sued in the district holding international headquarters.

75. NLRA § 2(5), 29 U.S.C. § 152(5) (1982). The LMRDA definition includes unions representing individuals under the Railway Labor Act, agricultural employees, and some public employees. S. REP. NO. 187, 86th Cong., 1st Sess. 52 (1959).

76. That is, it is "chartered by a labor organization [the international] . . . as the local or subordinate body through which such employees may enjoy membership" LMRDA § 3(j)(4), 29 U.S.C. § 402(j)(4) (1982).

77. LMRDA § 3(f), 29 U.S.C. § 402(f) (1982).

78. "Employer" is defined in section 3(e) and must be "engaged in an industry affecting commerce." "Affecting commerce," helpfully enough, "means . . . in commerce," § 3(c), and "commerce" includes trade and the like "between any State and any place outside thereof." LMRDA § 3(a), 29 U.S.C. § 402 (1982).

79. See, e.g., *Black v. Transport Workers*, 454 F. Supp. 813, 821 n.8 (S.D.N.Y.), *aff'd mem.*, 594 F.2d 851 (2d Cir. 1978). Professor Michael Goldberg urged both this statutory reading, and the analogy to public employee locals, on me.

the institution of international unionism leads rather to the conclusion that the LMRDA *must* be applied to the Canadian activities of the international union, but that this application to internationals would obviate any direct regulation of Canadian locals.

Congress may not have addressed, or even thought about, the problem of Canadian LMRDA plaintiffs. Nevertheless, it was well aware that the institutions on whose regulation it was embarking—the international unions—were indeed international organizations, whose international character created problems for law enforcement. Senate investigators on the trail of large amounts of cash removed from the treasury of the United Textile Workers (AFL) and apparently used to purchase and furnish the private homes of the president and secretary-treasurer encountered the union's extraordinary defense that the cash was used to hire strongmen to keep alleged communists out of Canadian plants.⁸⁰ The chairman of the Western Conference of Teamsters, whose jurisdiction included three Canadian provinces and eleven western states, told of using \$400,000 in members' dues to purchase stock in a Canadian trucking company which was then turned over to an employer friend.⁸¹ Antidemocracy, like corruption, did not respect boundaries. The Bakery and Confectionary Workers rammed antidemocratic constitutional amendments through a "controlled" convention; the "controlled" locals included Canadian as well as United States locals.⁸²

The LMRDA was enacted in order to give union members legal remedies against corruption or authoritarianism of this kind. Following the adoption of the legislation, an AFL textile worker in Virginia or a teamster in Oregon could sue the union officials to remedy their breach of their fiduciary obligations.⁸³ It seems obvious that if Congress had thought about Canadian workers, equally victimized by these American union leaders, it would have seen no difficulty in a suit in federal court by those workers as well.

For better or worse, the rights in the LMRDA were not granted to union members as a reward for them personally, as a subsidy or political favor to unionists. The entire focus of the investigations and legislative debate was on the unions as institutions, the corruption of some leaders, and the need for tools to clean up the unions. Quite certainly, if the 1959 Congress had

80. *Hearings on Investigation of Improper Activities in the Labor or Management Field Before the Senate Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess. 3294–303 (1957) (testimony of Lloyd Klenert). *See also id.* at 3503–04.

81. *Id.* at 1306–26 (testimony of Frank Brewster). At the time of the hearing, the money had not been repaid.

82. *Id.* at 2796–801.

83. LMRDA § 501(b), 29 U.S.C. § 501(b) (1982).

been asked: "Are you providing benefits for Canadian unionists?", its answer would have been that this was far from its concern. This is not the right question, however. The question is rather: "When a union governed by the LMRDA behaves improperly, may union members harmed by the action sue to put a stop to it?" The instrumental quality of LMRDA suits—their perceived value to regulate an American institution—compels the conclusion that the nationality of the plaintiff was irrelevant to Congress.

This has been the consistent interpretation by the Department of Labor of those titles of the LMRDA for which it has enforcement responsibility. In its earliest regulations interpreting the Act, the Department provided that the imposition of a trusteeship on a Canadian local by a United States national or international union is subject to Title III of the LMRDA.⁸⁴ Similarly, elections for national or international officers including Canadian and American voters must be conducted in compliance with the LMRDA.⁸⁵ The Department disclaims any application of the Act directly to Canadian locals.⁸⁶ These provisions have been the Department's consistent policy since the enactment of the statute.

84. 29 C.F.R. § 451.6(c) (1984). So far as I can determine, the Department has never taken action against an international union for imposing a trusteeship on a Canadian local.

Trusteeships not in compliance with Title III, that is, established for an improper purpose or subject to the political or financial manipulation of international officers, may be the subject of a lawsuit by either the Secretary of Labor or a member or subordinate body of the labor organization. LMRDA § 304(a), 29 U.S.C. § 464(a) (1982). Presumably this possibility of individual suits remains live if the trusteeship complained of is over a foreign local, particularly in light of the Department's historic lack of interest in Title III suits. See D. McLAUGHLIN & A. SCHOOMAKER, *THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY* 139-43 (1979) (Department brought five suits to terminate trusteeships during first 15 years of Act).

85. 29 C.F.R. § 451.6(b) (1984). The Department has not had an easy time enforcing this regulation. Canada has no machinery in place for investigating union elections. Nor would Canada allow American investigators to follow up reports of improper conduct in either the Mineworkers election of 1972 or the Steelworkers elections of 1965 and 1977 since the Canadian government does not accept the United States Department of Labor's assertion that international elections must follow LMRDA standards as to the Canadian ballots as well. In 1965, the United States Department of Labor avoided confrontation by concluding that the electioneering by the Canadian director involved negligible amounts of union money and could not have affected the election. J. HERLING, *RIGHT TO CHALLENGE: PEOPLE AND POWER IN THE STEELWORKERS UNION* 284-85 (1972). In 1972 and 1977, the Canadian Ministry of Labour appointed its own board of inquiry—a fairly extraordinary move in Canadian labor law—to investigate alleged misconduct. In 1977, the board was headed by a former judge and active arbitrator, frequently under steel contracts, who was regarded by dissidents as favorable to the union victors. While no one has accused him of any improprieties in his investigation, United States Department of Labor officials who have spoken with me privately have suggested that the appointment of an individual with his background displayed a certain lack of sensitivity to the seriousness with which the Americans regarded the charges respecting Canadian ballot handling. His report was finally submitted to the Department almost nine months after the election and two months after the time would normally have expired for the Department to file suit, time extended only by gracious waivers from the union. Ultimately the Department decided not to challenge the 1977 election. See *Sadlowski v. Marshall*, 464 F. Supp. 858 (D.D.C. 1979).

86. 29 C.F.R. § 451.6(a) (1984).

IV. APPLYING THE STANDARD

We turn now to three standard hypothetical suits under the LMRDA: (a) a Canadian unionist sues her own local in a United States district court, complaining of their discipline of her or actions towards her; (b) she sues the international, complaining of the local's actions; and (c) she sues the international, complaining of its own actions, such as affirming the local's discipline. The first two suits are problematic, either as a matter of personal jurisdiction or substantive labor law. The third suit presents no serious problems and should be entertained by the federal court.

A. *Suit Against the Canadian Local*

A suit in United States federal court by a Canadian unionist against the Canadian local of an American-based international presents such knotty interpretative problems under the LMRDA that it is hard to conclude that Congress intended the effort. One, already mentioned, is the difficult question of whether the Canadian local is a "labor organization" within the meaning of the statute.⁸⁷ A second, even more serious, is the problem of jurisdiction: suit must be brought in the district where the alleged violation occurred or where the labor organization has its principal office.⁸⁸ Neither seems to comprehend a suit against a Canadian local. Consequently, the relationship between a Canadian member of an international union and her local would seem to be governed by Canadian law.⁸⁹

B. *Suit Against the International, Complaining of the Local's Discipline*

Suppose the Canadian unionist, disciplined by her local for free speech or under improper procedure, does not appeal the discipline within the union, but instead sues the international under the LMRDA.⁹⁰ This suit

87. See *supra* text accompanying notes 72–79.

88. LMRDA § 102, 29 U.S.C. § 412 (1982).

89. Query however the interesting possibility that the Canadian court might elect to sharpen the content of the vague "natural justice" standard, in the case of the local of a United States-based international, by recourse to the law under the LMRDA, either as an analogy or under its own choice of law rules. See *supra* note 5.

90. The LMRDA does not require exhaustion of internal union remedies, nor may unions bind their members directly or indirectly to mandatory exhaustion. The district court hearing the Title I suit may in its discretion require plaintiff to await four months of internal union processes. LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1982). See *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418 (1968); *Pawlak v. Greenawalt*, 628 F.2d 826 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *Detroy v. American Guild of Variety Artists*, 286 F.2d 75 (2d Cir. 1961), *cert. denied*, 366 U.S. 929 (1962).

presents substantive questions under the LMRDA of an international's liability for acts taken at a local level. Authority is divided, but under the more recent cases such a suit will be unsuccessful.

It is necessary to distinguish two separate theories of the international's liability. One is agency; the local might be treated as the agent of the international. A distinct theory is international liability because of its own obligations under the LMRDA, which might, entirely apart from agency questions, be defined so as to include duties of supervision or correction of local unions. The cases properly treat the theories separately but invariably and improperly reach a like result in each.

The LMRDA does not discuss agency liability. Consequently, some standard of agency must be borrowed from some other source or concocted. Currently three such theories compete. The most expansive assertedly applies common law to find the local to be the agent of the international, making the international liable under respondeat superior for torts committed by the local in the scope of its authority.⁹¹ The most restricted is the agency standard of the Norris-LaGuardia Act.⁹² However, the internationals who have argued for the application of the latter standard under the LMRDA have been uniformly unsuccessful.⁹³ The intermediate standard is the so-called common law agency standard of the Labor-Management Relations (Taft-Hartley) Act,⁹⁴ which has recently been applied to an LMRDA case in what appears to be an influential opinion.⁹⁵ Under this standard, an international is not normally liable for discipline carried out entirely at the local level.

91. *Allen v. International Alliance of Theatrical, Stage Employees & Moving Picture Machine Operators*, 338 F.2d 309, 318-19 (5th Cir. 1964) (Wisdom, J.). The statement in the text is, strictly speaking, an alternative ground for the holding, since the international was also found liable on the basis of its participation in the local's actions. *Id.* at 317. Moreover, the case does not appear to have been cited for its agency holding.

92. Norris-LaGuardia Act § 6, 29 U.S.C. § 106 (1982) (requiring "clear proof of actual participation in, or actual authorization of, such acts [of agents] or of ratification of such acts after actual knowledge thereof.").

93. *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 170-74 (9th Cir. 1980); *Shimman v. Frank*, 625 F.2d 80, 95 n.26 (6th Cir. 1980).

94. Labor-Management Relations (Taft-Hartley) Act § 301(e), 29 U.S.C. § 185(e) (1982) (providing in terms only that actual authorization or subsequent ratification are not necessary conditions to a finding of agency). The Supreme Court's authoritative construction of this section found it to have adopted a common law agency standard. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 216 (1979).

95. *Shimman v. Frank*, 625 F.2d 80, 95 n.26, *reh'g denied*, 633 F.2d 468 (6th Cir. 1980) (international liable only if it authorizes, supports, commands, or requires action, or if international controls local). *Shimman* has been followed in *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 810 (10th Cir. 1984); *Urichuck v. Clark*, 689 F.2d 40, 43 (3d Cir. 1982); and *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 173 (9th Cir. 1980).

A more interesting question, in my view, is whether the international union's own duties under the LMRDA, to secure the rights of members under the bill of rights, include duties to supervise, control, or correct lapses of democracy at the local level.⁹⁶ It is not difficult to imagine such a duty in the international although there are obstacles to its creation. Certainly Congress regarded the restoration of democratic procedures as a permissible reason for an international to step into a local,⁹⁷ but this does not mean that Congress regarded it as a neglect of duty for an international not to step in under those circumstances. Some commentators see the trusteeship title in particular as supporting a policy of "local autonomy;" under this view courts should hesitate to construe Title I so as to create any duties in the international to supervise and control locals. The analogous provision of the United States Constitution, requiring states to observe a republican form of government, has not been doctrinally fruitful or read as imposing any particular duties of supervision or control on the national government.⁹⁸

Discussion of any such affirmative duty of supervision under the LMRDA must remain theoretical for the present. Two courts of appeal have recently held on the facts presented that no such duty exists.⁹⁹ While this still leaves room for the evolution of some sort of duty of supervision in the international, it requires no genius to predict that the courts are more likely

96. I assume that the rights in the bill of rights are Hohfeldian "rights" which imply correlative "duties" in the union.

97. LMRDA § 302, 29 U.S.C. § 462 (1982).

98. U.S. CONST. art. IV, § 4. *See Baker v. Carr*, 369 U.S. 186, 217–29 (1962); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 139–51 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849). *See generally* W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972).

99. *Chapa v. Local 18*, 737 F.2d 929, 932–33 (11th Cir. 1984) (no duty in international union to prevent allegedly unfair disciplinary proceedings, despite attendance of its representative at local meetings); *Shimman v. Frank*, 625 F.2d 80, 99 (6th Cir. 1980) (no duty in international to prevent beating of dissidents by thugs directed by district representative). Both cases reach this result through an unsound analogy. In *Carbon Fuel v. United Mine Workers*, 444 U.S. 212, 217–18 (1979), a case under the Labor-Management Relations (Taft-Hartley) Act, the Supreme Court discussed and rejected the notion of an international union's duty to supervise or control wildcat strikes by locals. The Court did hold, in that case, that the international's liability as a principal and its supervisory liability should be coextensive. *Id.* This was true, however, because there was literally no basis at all for imputing supervisory responsibilities to the international except by implication from Congress' support for arbitration. *Id.* at 218. No statute even arguably created such liability and, the Court held later in the opinion, no contract did either. *Id.* By examining what Congress had done on agency liability, the Court could reject the employer's claim that the statute implicitly created supervisory liability.

By contrast, under the LMRDA, the international's supervisory obligations, whatever they are, do not rest on some vague liability imputed from its liability as a principal. The international union has obligations directly under the LMRDA to avoid infringing the rights secured to union members, such as free speech and assembly. Whether the international's obligations include duties of supervision and control of locals is a question of the substantive interpretation of the LMRDA, not a question of agency. This is particularly true since, as we have noted, Congress did not even discuss the appropriate agency standard under the LMRDA and the question of agency standard has divided the circuits.

to develop this duty in the first instance in cases alleging a duty to supervise a United States-based local. Consequently, for the foreseeable future, a Canadian unionist who does not appeal local discipline will probably not be able successfully to sue an international union not directly involved in the discipline.

C. Suit Against the International, After It Affirms Local Discipline

The topic of this article comes into play once the Canadian unionist has appealed her discipline to the international and the latter has affirmed the discipline. On such affirmance the international normally has committed a separate violation of the LMRDA in its own right and may be sued in order to remedy the violation.¹⁰⁰

This article has argued that there are no obstacles in international law or comity to such a suit. The violation is by an unquestioned labor organization, being sued in the federal district where it has its headquarters. The violation complained of, that is, the affirmance of the discipline, occurred in the United States. Plaintiff is a member of the affected labor organization. There would normally be no conflict with the law of other nations.¹⁰¹

It would be the international union, not the plaintiff, which would raise issues of international law and comity, by means of a motion to dismiss. This article has attempted to show why such a motion should not be granted. First, under some approaches with academic support and judicial application (the Jones Act cases), there is present a choice of law question but not a jurisdictional question. The court must decide whether Canadian or American law governs the relationship between the unionist and the international union, although it need make that decision only if there is a true conflict between the two systems. Secondly, if the court decided that there is a serious question about its jurisdiction, it must answer that question on the basis of Congress' will, since if Congress intended the case to be heard, the court must do so. I have tried to show that "Congress' intent" respecting the application of the LMRDA to Canadian members will involve the court's empathetic identification with the concerns and values of the 1959 Congress. I have also tried to show that Congress was

100. *Petramale v. Local 17, Laborers Int'l Union*, 736 F.2d 13 (2d Cir.), *cert. denied*, 105 S. Ct. 593 (1984). A recent district court case explains the rationale: if the member's appeal puts the international on notice of the local's violations, then affirmance by the international constitutes a ratification. *Rodonich v. House Wreckers Union Local 95, Laborers Int'l Union*, 624 F. Supp. 678, 685 (S.D.N.Y. 1985) (denying international's motion for summary judgment).

101. Potential conflicts, if any, between the international's obligations under Canadian and United States law could be dealt with if and when they arise. I have been unable to think of any circumstance in which the LMRDA would require an international union to do something which Canadian labor law would forbid. Obviously my knowledge of Canadian labor law is limited.

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aware of the international activities of some of the corrupt internationals of greatest concern to it, and that, had it considered the question whether such corruption or authoritarianism should be remedied if visited on Canadian members, would probably have answered yes. Finally, I have shown that ample precedent exists for the application of a federal statute on behalf of a foreign plaintiff victimized by an American violation, on the theory that American courts may regulate either American nationals, or American conduct, or conduct with domestic effects.

V. CONCLUSION

Canadian members of United States-based international unions acquire rights against their international under Titles I, III, IV, and V of the LMRDA. Once the international acts to affirm discipline imposed on an improper basis, or through improper procedures, the Canadian unionist may sue to remedy the violation in the United States district court where the international has its headquarters. The Canadian unionist's relations with her local, on the other hand, are governed either principally or exclusively by Canadian common law.

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